STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ERNESTO EVARISTO URIBE

Defendant-Appellant.
_____/

Supreme Court No. 159194

Court of Appeals No. 338586

Lower Court No. 13-20404-FC

EATON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

BY: Michael R. Waldo (P72342)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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I. Did the trial court abuse its discretion by allowing an expert in child sexual abuse to repeat the 13-year-old complainant's statements made during an exam, where the expert conducted the exam at the behest of law enforcement, the complainant reported no injuries or symptoms, the exam yielded no physical evidence of abuse, and four years had elapsed since the last alleged sexual contact?

Court of Appeals answers, "No."

Ernesto Evaristo Uribe answers, "Yes."

II. Did the trial court abuse its discretion in denying a mistrial after a prosecution expert testified that he believed the accusations against Mr. Uribe were true, thus encroaching on the jury's province as the exclusive finder of fact?

Court of Appeals answers, "No."

Ernesto Evaristo Uribe answers, "Yes."

Statement of Facts

Background

Ernesto Uribe and Cathleen Ortez lived together for about seven years. (639a, 650a) During that time, they had two daughters, JU and MU. (639a) Ms. Ortez also had two daughters from a previous relationship, Ana Aleesya (born in 1995) and Vanessa (born in 1999). (639a) Ms. Ortez and Mr. Uribe broke up in 2008 and Mr. Uribe moved out of the house they shared. (639a, 660a)

Mr. Uribe remained involved in his children's lives and regularly picked them up from Ms. Ortez's house for visits. (651a-652a, 673a-674a) Soon after breaking up with Ms. Ortez, Mr. Uribe began a new relationship with Elizabeth Hall, who would often accompany him on these visits. (673a-674a, 886a-889a) Ms. Hall recalled that Vanessa would often ask to join her sisters on their weekend visits with Mr. Uribe. (886a)

In September 2012, four years after Mr. Uribe moved out, when Vanessa was thirteen years old, she disclosed to her friend that Mr. Uribe had sexually abused her over the course of several years, when she was between the ages of five and nine years old. (465a-466a)

Vanessa's friend first disclosed to her that she had been sexually abused. (466a) Vanessa did not want her friend to feel alone so she told her friend that she, too, had been abused. (466a) Vanessa told another friend, then told her mother. (466a, 653a)

Her mother contacted the Lansing Police Department. (793a) Officer Shawn Martinez was dispatched and he spoke with Ms. Ortez and Vanessa. (475a-476a, 793a-795a) The case was referred to Detective Dahlke, who conducted a forensic interview of Vanessa on September 25, 2012. (476a, 816a-818a, 839a) As a matter of protocol, Detective Dahlke then referred Vanessa to be examined by Dr. Stephen Guertin. (839a-840a)

Mr. Uribe was subsequently charged with four counts of first-degree criminal sexual conduct.

Pre-Trial

Mr. Uribe filed a pre-trial motion in limine seeking to preclude Dr. Guertin from repeating Vanessa's statements to him during his interview and exam. (60a) Mr. Uribe asserted Vanessa's statements were inadmissible hearsay and were not reasonably necessary for medical diagnosis or treatment under MRE 803(4). (60a) After hearing testimony from Dr. Guertin (75a-95a) and argument from counsel, the court addressed the factors outlined in *People v Meeboer*[1] and concluded Vanessa's statements were admissible under MRE 803(4). (126a-132a) The court explicitly cautioned the prosecution that Dr. Guertin would not be permitted to opine on whether he believed Vanessa was telling the truth about being assaulted. (131a)

In addition to Dr. Guertin's testimony, the parties litigated the admissibility of testimony from Mr. Uribe's daughter, JU. More than a year after Vanessa's allegation, JU told her mom that Mr. Uribe had touched her inappropriately when

[1] *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992).

she was nine or ten years old. (16a) The prosecution sought to admit this testimony pursuant to MCL 768.27a. A hearing was held on March 21, 2014, where the trial court ruled JU's testimony was inadmissible under MRE 403 due to the court's "many concerns" about JU's allegations, including the inconsistencies in her statement and the fact that in 2012, after Vanessa made her allegations, JU told CPS investigators that her father never touched her inappropriately. (19a-22a)

The prosecution filed an interlocutory appeal and the Court of Appeals reversed the court's ruling, holding JU's testimony was admissible. *People v Uribe,* 310 Mich App 467; 872 NW2d 511 (2015). This Court heard oral argument and vacated the Court of Appeals' judgment, but nonetheless concluded that JU's testimony was admissible. *People v Uribe,* 499 Mich 921; 878 NW2d 474 (Mem) (2016).

Trial

At trial, Vanessa testified that Mr. Uribe assaulted her by penetrating her anus with his penis, when she was between the ages of five and nine. (446a-464a) She specifically recounted four such events, which occurred while the family lived in Stonegate trailer park, in a house on Courtland Drive, and in Kensington Meadows trailer park, respectively. (448a, 454a, 457a, 462a) According to Vanessa, the day after the first incident, Mr. Uribe told her not to tell anyone; he gave her a quarter, and he threatened to kill her father if she told anyone what happened. (450a) Mr. Uribe and Vanessa's father previously had a fight that left her father with a nose that looked broken and earrings ripped out. (450a-451a)

Vanessa did not recall whether she cried when the alleged assaults occurred. (449a, 454a, 458a) She did not recall whether she experienced physical pain. (515a) She never screamed. (504a-505a) She never bled. (506a, 575a) She did not know where the other family members were during these alleged assaults. (449a-450a, 455a, 459a) She did not complain about discomfort afterwards, even when visiting her family doctor within the four to five-year timeframe she alleged she was abused. (518a, 544a, 550a, 575a)

Ms. Ortez never saw any warning signs that her daughter had been abused. (673a) Vanessa was a happy child and a good student. (673a) She never complained of constipation or that her butt hurt. (659a, 673a) According to Ms. Ortez, Vanessa started having trouble at school after she made her allegations. (654a-655a) She also had problems with her siblings after her disclosure, including her younger sister JU, "who loves her father dearly and didn't want to believe that he was capable of doing that to her." (655a, 468a-469a)

Dr. Stephen Guertin was presented as an expert on child sexual abuse, child abuse and pediatric clinical care. (594a) He interviewed and examined Vanessa on October 25, 2012, when she was thirteen years old, after Detective Dahlke referred Vanessa to him. (594a-595a, 605a)

Dr. Guertin testified about the exam he conducted as well as statements Vanessa made to him. When he asked Vanessa if she knew why she was there, Vanessa stated it was because Mr. Uribe had done "bad things" to her when she was between the ages of five and nine. (598a-599a) He recounted that Vanessa told him

that Mr. Uribe put his penis in her butt. (601a) She told Dr. Guertin it hurt, but there was no bleeding. (602a) She told Dr. Guertin that it did not hurt to defecate afterward, which he found "a little surprising." (603a) She also told Dr. Guertin that Mr. Uribe told her to keep it secret, and he threatened to kill her dad if she told anyone. (604a)

Dr. Guertin's physical examination of Vanessa was "fairly normal." (612a-613a) He found a superficial notch on her hymen, which could be normal, but could also be residual of sexual trauma by someone other than Mr. Uribe, since there was no claim that Mr. Uribe ever touched her vagina. (611a, 618a) He also found an area of stretched skin on her anus, which is commonly seen and can result normally from passing large or hard stool, or can be the result of sexual trauma. (611a-612a) There was no scar tissue beneath the stretched skin. (611a) He tested her for disease, but the results were negative. (612a) To Dr. Guertin's knowledge, Vanessa had never had a psychological evaluation. (619a) He said he should have recommended that Vanessa seek psychological treatment, but he neglected to do so. (619a-620a)

On cross-examination, defense counsel asked Dr. Guertin why he should have referred Vanessa for psychological treatment. He replied, "[i]t'd be helpful in this particular case because she's been through a really -- an adverse childhood event that could have long-term impacts on her -- impact on her, what has happened to her is something that she shouldn't have to keep to herself..." (621a) Counsel asked

Dr. Guertin about the lack of a diagnosis of sexual abuse in his report. The following exchange occurred:

> **Q** Now, Doctor, Dr. Guertin, I believe in prior times we've had hearings, and I believe you mentioned that sexual abuse can be a diagnosis.
>
> **A** Sexual abuse, physical abuse, child abuse is a diagnosis, a medical diagnosis.
>
> **Q** Which causes my next question, is that in your evaluation under your Assessment portion of your report, you never diagnose [Vanessa] as being a victim of sexual abuse.
>
> **A** Well, I feel that the report, pretty much speaks for itself in that regard. **But if you're asking me do I consider to -- her to be a victim, I do**.
>
> **Q** Well, you didn't put that in your report doctor.
>
> **A** Well, it says:
>
> "She gives a very clear history of being sexually molested between the ages of five and nine. She indicates that the person who did this was a man…"
>
> **Q** Is it -- is it true, Doctor, you did not specifically say, and diagnose her specifically in your report that she's a victim of sexual abuse?
>
> **A** Right. There's no portion in this assessment where it says diagnosis is sexual abuse, that's true.

(623a-624a) (emphasis added)

On re-direct examination, the prosecutor asked Dr. Guertin, "**[i]s that your diagnosis**?" He replied, "**Yes, it is**." (624a) (emphasis added)

After Dr. Guertin testified he believed Vanessa was a victim and the prosecutor elicited that Dr. Guertin diagnosed Vanessa with sexual abuse, counsel

again challenged Dr. Guertin with the omitted diagnosis in his report to Detective Dahlke. The relevant portion of counsel's recross-examination is as follows:

> **Q** Dr. Guertin, you didn't say in your report, back when you did the actual assessment or evaluation, that she is diagnosed with — as a —— as a victim of sexual abuse. Now, five years later, reflecting back, you're saying that's my diagnosis?
>
> **A** Well ——
>
> **Q** Do you see where I'm having a problem with that, Doctor?
>
> **A** Actually, I don't. So, I think the report speaks for itself. You can read this report, and you can see what's said in it, you can see what I've pointed out in it. It's true, I do not have a section–
>
> **THE COURT:** Well –
>
> **THE WITNESS:** -- of the report that says diagnosis of child abuse.
>
> **[DEFENSE COUNSEL]:** Well –
>
> **THE WITNESS:** That doesn't mean I can't hold that particular opinion. In fact, I have held that opinion since then.
>
> **BY [DEFENSE COUNSEL]:**
>
> **Q** Well, Doctor –
>
> **A** And I'm now expressing it.
>
> **Q** Dr. Guertin, if this report was then provided to a psychologist or a social worker, they're reading it —— another professional, they're reading it, and they're like where's the diagnosis.
>
> **A** Well, there's not a statement there that say "diagnosis: sexual abuse." If you read this report and read the content of this report and what we discussed, **in my opinion there would be no question that she's been sexually abused.** And I feel that way now, and I felt that way then.

> **Q** There's no specific diagnosis victim of sexual abuse. But you never say anything in your report, victim of sexual abuse. Despite a diagnosis, you say nothing in your report that she's a victim of sexual abuse. Now, what's your –
>
> **A** The entire report tends to say that she's a victim of sexual abuse. In fact, it says how it happened. It says the period of years in which it happened, gives the implication of almost how many times it happened. It describes whether or not she was manipulated into not saying anything about it, describes the circumstances of the disclosure. It describes the reasons why we had to test her for venereal disease. It describes whether or not she's protected. It describes whether or not the police are aware of this.
>
> It is true there's not a line that says "diagnosis: sexual abuse." But if you are asking my opinion, and if you read this, I think it should be clear that this document supports that she was sexually abused. And based on her history to me, **I believe that she was**.

(625a-627a) (emphasis added)

After Dr. Guertin testified, outside the presence of the jury, the trial court raised its concern about Dr. Guertin's testimony, and the defense moved for a mistrial. But the court opted to continue the trial, and to deliver a curative instruction to the jury. (628a-631a, 680a-681a, 688a-704a) Accordingly, the court instructed the jury as follows:

> Yesterday, you heard the testimony of Dr. Guertin. At the end of his testimony, you may believe that he rendered an opinion whether sexual assault occurred in this case. That testimony is not allowed and is stricken from the record.
>
> An expert is prohibited from rendering an opinion that sexual assault occurred. You are not to consider any opinion that you think Dr. Guertin had regarding whether sexual assault occurred in this case. That is your decision and only your decision to make.

(709a)

In addition to Dr. Guertin, the prosecution presented testimony from Vanessa's primary care physician, Dr. David Luginbill, who had been treating her since she was born. (543a) Dr. Luginbill conducted routine and thorough physical examinations of Vanessa numerous times over the years. (549a) He treated her for urinary tract infections twice in 2004, when she five years old, and also in 2010, when she was eleven. (544a-545a, 552a) He never treated her for constipation. (545a) She never complained that her butt hurt or was bleeding. (575a) He examined her genitals in 2004 and found that they were normal. (550a) He found her genitals were normal in 2010 as well. (552a, 579a)

In 2004, Dr. Luginbill diagnosed Vanessa with Attention Deficit Hyperactivity Disorder (ADHD) when she was "unable to pay attention in class." (546a-547a) He began prescribing medications for that condition. (547a) In 2004, 2005, 2007 and 2013, he noted that her mood and affect were normal. (567a, 568a, 570a, 572a)

Dr. James Henry testified as an expert on the behavior of children who have been sexually abused or have experienced sexual trauma. (740a) He said that the vast majority of children delay disclosure for a significant length of time. (716a) His research showed an average delay of 2½ years. (717a) When they do disclose, they often do so in bits and pieces. (745a) They commonly disclose first to a peer, and often after learning that that person has had a similar experience. (747a-748a)

Dr. Henry said that children who have suffered sexual trauma may be withdrawn, become depressed and exhibit a flat affect. (752a) They may become defiant, oppositional or aggressive. (752a) They may engage in hyper-sexualized behavior. (755a) They may be hypervigilant, which masks as ADHD. (755a-756a) They can still seem cheerful and perform well in school. (757a)

The defense presented Dr. Sharon Hobbs, a clinical psychologist with a background in the behavior of children who have been sexually abused. (910a) She emphasized that a psychological evaluation is important for attempting to discern when abuse allegations are credible. (917a-920a) A thorough assessment includes looking at school records and protective services reports, in order to ascertain how the child is behaving and performing in other aspects of her life. (930a-931a) She said that anal penetration of a young child would be very painful, and children who have been sodomized often complain of constipation because they are afraid it will hurt to defecate. (926a-927a)

Dr. Hobbs agreed that abused children sometimes appear to have ADHD, due to changes in their behavior. (923a) They may experience unconscious displacement, which is venting their emotions at a different person than the one who injured them. She described it as going home and screaming at her husband because the judge screamed at her earlier that day. (928a) They may experience unconscious transference, which is transferring their emotions about a harmful experience into a different situation. She described it as a child being angry at her for wearing a red

dress, because a person who had mistreated the child had worn a red dress. (928a-929a)

Mr. Uribe's daughter and Vanessa's younger sister, JU, testified over defense objection about an alleged incident that occurred when JU visited Mr. Uribe in the summer of 2013. She said that while she lay in bed with Mr. Uribe and his fiancé Elizabeth Hall, with several other family members watching TV in the same room, Mr. Uribe "put his hand down [her] pants while [they] were sleeping." (847a, 850a-851a) Specifically, she said he would put his hand by her naval, with his fingers reaching into the top of her underwear, "on top of [her] crotch." (871a-872a) She said she would toss and turn, then he would "touch[] [her] butt cheek" and try to put her hand on his penis. (852a) She claimed she would pretend to stretch and turn over, after which he would put his hand in her underwear again. (853a) She did not know whether Mr. Uribe was awake during this incident. (865a)

When JU got up the next morning, she saw Mr. Uribe's penis under the blanket. (856a) That same morning, JU told her sister Gadida (sic: Querida) what had occurred. (855a)

Mr. Uribe was not the only person JU accused of committing sexual misconduct. Her godmother, Tina Gonzalez, sometimes babysat the children, along with her husband. (497a-498a) JU admitted telling her mother that Tina Gonzalez's husband would touch her butt and pinch it to wake her up. (875a) Relatedly, Elizabeth Hall said that JU reported that, around 2011, Ms. Gonzalez's husband

would crawl into bed with her and her sister and "cuddle and fondle their butts." (890a)

The jury convicted Mr. Uribe as charged of four counts of first-degree criminal sexual conduct. He was sentenced to fifty to seventy-five years in prison. (1104a)

The Court of Appeals affirmed Mr. Uribe's convictions in a 2-1 unpublished per curiam opinion, issued January 3, 2019 (Docket No. 338586). (1107a) Judge Gadola dissented and would have granted Mr. Uribe a new trial based on Dr. Guertin's testimony. (1107a-1110a) On April 24, 2020, this Court issued an Order directing the parties to file supplemental briefing on the following issues: "(1) whether Dr. Guertin's testimony about the complainant's statements to him was admissible under the medical treatment exception to the hearsay rule, (2) whether Dr. Guertin's testimony was contrary to this Court's decision in *People v. Thorpe*, 504 Mich. 230, 934 N.W.2d 693 (2019), and/or *People v. Harbison*, 504 Mich. 230, 934 N.W.2d 693 (2019); and (3) if error occurred, whether reversal of the defendant's convictions is warranted." *People v Uribe*, 941 NW2d 381 (Mich, 2020)

I. The trial court abused its discretion by allowing an expert in child sexual abuse to repeat the 13-year-old complainant's statements made during an exam, where the expert conducted the exam at the behest of law enforcement, the complainant reported no injuries or symptoms, the exam yielded no physical evidence of abuse, and four years had elapsed since the last alleged sexual contact.

Issue Preservation and Standard of Review

This challenge was preserved by a pre-trial motion in limine. (60a, 126a-132a) Generally, the standard of review of a trial court's decision whether to admit evidence is abuse of discretion. *People v Lukity,* 460 Mich 484; 596 NW2d 607 (1999). When the decision "regarding the admission of evidence … involve[s] preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence, the trial court's decision is reviewed de novo." *Id.* at 609-610 citing *People v Sierb,* 456 Mich 519; 581 NW2d 219 (1998). Admission of legally inadmissible evidence is necessarily an abuse of discretion. *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004).

Discussion

The trial court abused its discretion when it allowed Dr. Guertin to repeat the allegations Vanessa made to him during his examination, which occurred thirty days after her initial disclosure and four years after the last alleged incident of abuse. Vanessa did not seek medical treatment on her own, nor did she report any physical symptoms or concerns. Rather, she went to Dr. Guertin at the behest of Detective Dahlke in the course of the criminal investigation. Under these circumstances, the prosecutor did not establish the foundational reliability of Vanessa's statements to Dr. Guertin. Where Mr. Uribe's conviction turned on the

jury's assessment of Vanessa's credibility, Dr. Guertin's testimony unfairly impacted that analysis and deprived Mr. Uribe of a fair trial.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence for its truth. MRE 801(c). Hearsay is not admissible except as provided otherwise in the Michigan Rules of Evidence. MRE 802; *People v Eady,* 409 Mich 356; 294 NW2d 202 (1980). Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy. See *Solomon v Shuell,* 435 Mich 104, 119; 457 NW2d 669 (1990).

MRE 803(4) provides a hearsay exception for "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to diagnosis or treatment." MRE 803(4). "The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care." *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732, 736 (2009), citing *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621, 626 (1992).

Not all statements made to a medical provider meet the requirements for this hearsay exception. Courts must carefully scrutinize each case in order to determine

whether the given facts establish the foundational reliability of the out of court statements.

Here, the prosecutor failed to establish the foundational reliability of Vanessa's statements to Dr. Guertin. Vanessa had no self-interested motivation to be truthful to Dr. Guertin to help ensure that she would receive proper medical care. She was directed to see Dr. Guertin by law enforcement. Four years had elapsed since the last alleged incident, and she was reporting no physical pain or symptoms. Further, her statements were not reasonably necessary to any treatment or diagnosis, as no treatment was given[2] and any diagnosis rendered by Dr. Guertin was formulated solely based on Vanessa's allegations and for investigative purposes.

A. Vanessa's statements to Dr. Guertin were not based on a self-interested motivation to seek medical care and therefore were not sufficiently trustworthy to warrant admission under MRE 803(4).

Vanessa's statements to Dr. Guertin were not born out of a self-interested motivation to tell the truth in conjunction with medical treatment. She did not seek Dr. Guertin on her own for any treatment. Rather, she saw Dr. Guertin because Detective Dahlke referred her to see him as part of the ongoing criminal investigation into her allegations.

This Court has consistently found the involvement of law enforcement and the complainant's knowledge of the status of an investigation an important factor in

[2] The defense acknowledges that Dr. Guertin tested Vanessa for sexually transmitted infection, but this testing does not constitute treatment sufficient to establish the foundational reliability of Vanessa's hearsay statements.

assessing whether the statements were made for purposes of medical treatment.

In *People v Lalone*, 432 Mich 103, 109–17; 437 NW2d 611, 612–16 (1989), this Court held a 14-year-old complainant's identification of her stepfather as the perpetrator of her alleged sexual abuse, during a psychological exam, was inadmissible under MRE 803(4). This Court noted that statements made to a psychologist may not be as reliable as statements to a medical provider concerning a physical injury. *Id.* at 110. The reliability of the complainant's identification was further diminished because, before the exam, the complainant had already reported the alleged crime to law enforcement. This Court explained that the consultation "did not have the same measure of reliability as would even a normal psychological session, since the complainant had already made the accusations and she was aware that a case against the defendant was being prepared." *Id.* at 115. Additionally, this Court concluded the identity of the perpetrator was not reasonably necessary to any diagnosis or treatment. *Id.* at 114.

Three years later, in *People v Meeboer*, 439 Mich 310, 325–26; 484 NW2d 621 (1992), this Court established a totality of the circumstances test to determine whether a statement by a child of tender-years to a medical provider was sufficiently trustworthy to warrant admission under MRE 803(4). *Meeboer* was a consolidated opinion that involved three cases and three complainants, aged four, six, and seven at the time of their respective medical examinations. After applying

the totality of the circumstances test[3] to all three cases, this Court held the complainant's statements were sufficiently reliable to warrant admission in two of the cases (*Conn* and *Meeboer*), and insufficiently reliable in one (*Craft*).

In *Conn* and *Meeboer*, the complainants' caregivers learned of their symptoms, which led to the physical exam by medical providers, during which they implicated the defendants. *Id.* at 315-318. Their statements were deemed sufficiently reliable.

In *Craft*, this Court held the four-year-old complainant's statements to the medical provider were unreliable and therefore inadmissible under MRE 803(4). That case involved two medical exams spaced about two months apart. Though many of the *Meeboer* factors weighed in favor of admitting the doctor's testimony, this Court held the declarant's statements to the second doctor were not sufficiently reliable, due to the complainant's young age[4] and because "[t]he passage of time

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[3] The *Meeboer* factors include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. *Id.* at 324-325.

[4] At four years old, it was "more difficult to establish she understood the need to be truthful to her physician." *Id.* at 336.

between the two examinations, as well as the participation of investigative authorities before the examination during which the child indicated that defendant had assaulted her, demonstrates the insufficiency of the evidence presented in support of the application of MRE 803(4)." *Id.* at 338.

The *Meeboer* Court also addressed its prior opinion in *Lalone* and reaffirmed its holding: "Although in *Lalone*, we did not analyze the facts according to a totality of circumstances test, upon such analysis[5] it is clear that the declarant's hearsay testimony of identification was properly excluded." *Meeboer*, 439 Mich at 327. This Court reiterated that statements made to a psychologist may be less reliable than statements to a physician. *Id.* In explaining the lack of trustworthiness in the complainant's hearsay statements, this Court reasoned, "[t]he complainant was fourteen years old and knew that a case was being prepared against defendant." *Id.*

The *Meeboer* factors were intended to determine whether a child of tender years understood the need to be truthful to his or her doctor. *Meeboer,* 439 Mich at 326. The Court of Appeals has since determined there is a rebuttable presumption that a child over the age of ten-years-old understands the need to tell his or her doctor the truth. See *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992); *People v Garland,* 286 Mich App 1, 9; 777 NW2d 732 (2009). As Vanessa was 13-years-old at the time of her exam, this presumption applies, but it

[5] This Court did not address each of the ten *Meeboer* factors when re-assessing *Lalone*. As the complainant was 14-years-old, many of these factors were not probative to whether she understood the need to tell the truth to her doctors. Instead, this Court focused on who initiated the exam, the time between the exam and alleged assault, and the type of exam.

does not end the analysis. The prosecution must still establish that her statements were born out of a self-interested motivation to tell the truth and **in order to receive proper medical care**. *Garland*, 286 Mich App at 8-9.

Lalone and *Meeboer* together establish that courts should use caution when considering statements ostensibly made for medical treatment where law enforcement is already investigating at the time of the purported "medical" exam. A declarant's knowledge that a criminal investigation is afoot undermines the reliability of statements made to his or her medical provider. See also *People v DePlanche,* 183 Mich App 685, 690; 455 NW2d 395 (1990) ("there are many circumstances about this case which call into question the reliability of the challenged statements… it is not at all clear that the child was brought to Dr. Hickok's office for medical treatment. Rather, it appears that the examination was done either to substantiate the allegations of abuse or to discover whether the child needed therapy or protection.")

Here, Vanessa clearly knew a criminal investigation was underway. Vanessa's very first statement to Dr. Guertin sheds light on what she perceived was the primary purpose of her exam. When Dr. Guertin asked Vanessa if she knew why she was there, Vanessa replied, "Yes, because I've had bad things happen to me when I was little." (598a) Critically, Vanessa did not say that she was there for a medical exam or to receive any sort of medical treatment. She did not report any present symptoms or injuries that required treatment.

Having disclosed her allegations, first to a friend from school, then to another

friend, then to her mother, then to Officer Martinez, then to Detective Dahlke in a forensic interview, Vanessa's primary motivation at her meeting with Dr. Guertin was likely to tell the same story she had already told to at least five people. See *Lalone,* 432 Mich at 110 ("surely once the complainant had offered the story to the police, she would offer consistent statements to a psychologist.")

In addition to the ongoing criminal investigation at the time of the exam, the four-year gap in time between the last alleged incident of abuse and the exam further diminishes any self-interested motivation Vanessa may have had to tell the truth in order to receive proper medical care.

In *People v Shaw,* 315 Mich App 668; 892 NW2d 15 (2016), the Michigan Court of Appeals held the complainant's statements to Dr. Guertin did not fall within the medical treatment and diagnosis exception in MRE 803(4). In that case, the 23-year-old complainant reported to police that her step-father had sexually abused her when she was between the ages of eight and sixteen. The police referred her to Dr. Guertin for an examination. The seven-year gap between the last alleged assault and Dr. Guertin's examination "minimize[ed] the likelihood that the complainant required treatment." *Id.* at 675. She had also received gynecological treatment by another physician during that seven-year gap. Accordingly, the complainant's statements to Dr. Guertin were not for purposes of diagnosis or treatment and Dr. Guertin should have been precluded from repeating these statements during his testimony. *Id.* at 676.

This case is nearly identical to *Shaw* and the same results are warranted for

the same reasons. As in *Shaw*, Vanessa did not seek medical care on her own, but was referred to Dr. Guertin by law enforcement. The four-year gap between the last alleged assault and the exam "minimized the likelihood that [Vanessa] needed treatment." *Id.* at 675. Where there were no symptoms or injuries to report, Vanessa did not have an inherent motivation to speak the truth to her provider, sufficient to meet the hearsay exception.

In *Garland*, the court held a Sexual Assault Nurse Examiner's (SANE) testimony repeating statements made by the complainant during an exam conducted within twenty-four hours of an alleged sexual assault fell within the MRE 803(4) hearsay exception.[6] *Garland,* 286 Mich App at 8-10. Notably, the complainant went to the hospital the same day as the alleged assault, prior to speaking with anyone from law enforcement. *Id.* The SANE nurse was the first person who recorded the complainant's account as to what occurred. *Id.* Based on that reported history, the nurse conducted the exam. *Id.* Since the complainant was more than ten years old, there was a rebuttable presumption that she understood the need to tell the truth during the exam. *Id.* citing *People v Crump,* 216 Mich App 210, 212; 549 NW2d 36 (1996); *Van Tassel,* 197 Mich App at 662. The lack of any apparent physical injuries on the complainant did not rebut the presumption. *Garland,* 286 Mich App at 9.

Garland is distinguished from the case at hand because the complainant in

[6] The complainant was declared unavailable to testify at trial and the defense challenged the SANE's testimony on both confrontation and hearsay grounds. *Garland,* 286 Mich App at 7-8.

that case went directly to the emergency room on her own volition, the same day as the alleged assault, without first going to the police. She clearly went to the emergency room to receive medical care even though an injury was not readily apparent. As the court explained, in cases of sexual assault in particular, injuries may be latent and still require treatment or diagnosis.

But in this case, where four years had passed, the possibility of a latent injury requiring treatment is severely diminished as compared to an immediate disclosure. The remote possibility of latent injury requiring treatment four years later does not satisfy the foundational requirement that Vanessa had a self-interested motivation to tell the truth in order to receive medical treatment, particularly since a month had passed since her disclosure and she did not seek treatment on her own.

Further, like the complainant in *Shaw*, Vanessa had been treated by her primary care provider, Dr. Luginbill, during the four years between the alleged abuse and Dr. Guertin's exam. In *Shaw,* the complainant had seen a gynecologist during the seven-year gap between her alleged assault and Dr. Guertin's exam, which the court emphasized in concluding her exam was not for medical treatment.

In this case, the Court of Appeals distinguished *Shaw* by noting that Dr. Luginbill never tested Vanessa for sexually transmitted infection and never examined her anus (1105a-1106a), though he did examine the outer areas of her genitalia and anus in conjunction with treating her for urinary tract infections. (578a-580a) From these facts, the court reasoned that, whereas the adult

complainant in *Shaw* could not have understood her exam by Dr. Guertin to be for medical treatment, Vanessa "could have." (1105a)

This distinction is inconsequential. It is unlikely that 13-year-old Vanessa had such a nuanced understanding of sexually transmitted infections – that despite the four-year passage of time and lack of any symptoms she would still have a self-interested motivation to tell Dr. Guertin the truth in order to be properly tested for sexually transmitted infections in her anus. Though "an injury need not be readily apparent" in order to establish a statement was made for medical treatment, the lack of any symptoms or injury in conjunction with the four-year passage of time weighs against any self-interested motivation Vanessa may have had to speak truthfully in order to receive treatment on the day of her exam with Dr. Guertin. *Shaw*, 315 Mich App at 674, citing *People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011).

B. Vanessa's statements to Dr. Guertin were not reasonably necessary to medical treatment or diagnosis.

Even if this Court concludes that Vanessa had a self-interested motivation to be truthful in order to receive proper medical care, exclusion of the hearsay was still warranted because her statements were not reasonably necessary to any medical treatment or diagnosis. As Vanessa had no present symptoms or physical complaints, and Dr. Guertin expected to find no physical injuries during his exam, the prosecution failed to establish the exam was conducted for medical treatment or diagnosis. Dr. Guertin did not provide Vanessa any medical treatment and he did

not refer her to any other provider. Any "diagnosis" Dr. Guertin may have made in this case was not to facilitate treatment, but rather to support the criminal investigation.

1. The exam was directed by law enforcement in support of a criminal investigation, not for medical treatment or diagnosis.

In essence, Dr. Guertin's pre-exam interview with Vanessa was akin to a forensic interview, statements from which are clearly inadmissible. See *People v Douglas*, 496 Mich 557; 852 NW2d 587 (2014). Where no physical evidence was found, and none was expected to be found, Vanessa's statements were not necessary for any medical treatment. Despite making no physical findings diagnostic of abuse, Dr. Guertin concluded Vanessa had been sexually abused solely on her statements, which the court improperly allowed him to repeat to the jury.

But for Vanessa's interaction with the police, she would have never seen Dr. Guertin. Like the complainant in *Shaw,* and unlike the complaint in *Garland,* Vanessa's exam was clearly directed by law enforcement in furtherance of the investigation. According to Detective Dahlke, Dr. Guertin's exam was the final piece of her investigation. (840a) Detective Dahlke did not refer Vanessa to her primary care provider, Dr. Luginbill. (840a) Standard protocol is to refer complainants to Dr. Guertin "because that's his specialty." (840a) Critically, as in *Shaw,* upon completing his exam, Dr. Guertin authored a report and sent it to Detective Dahlke. (619a) After she received Dr. Guertin's report, Detective Dahlke referred the case to the prosecutor. (840a)

Dr. Guertin explained his purpose in examining Vanessa: "[i]t wasn't just an exam, it was an evaluation for the possibility of sexual abuse." (595a) He stated the reasons for taking the history are: "to find out from the child what happened, to ascertain the relationship between the perpetrator and the child, whether the child needs to be protected from that person, and whether the child needs or is receiving psychological care." (600a)

An oral history is certainly standard before a physical exam, but the other purposes cited by Dr. Guertin did not establish Vanessa's statements were reasonably necessary for medical treatment. There was no need for Dr. Guertin to protect Vanessa from her alleged perpetrator, as law enforcement was already investigating the case. Vanessa identified Mr. Uribe as the perpetrator upon her initial disclosure, at least a month before Dr. Guertin ever saw her. Mr. Uribe had not lived with Vanessa for several years at the time of her allegation. Thus there was no need for Dr. Guertin to *treat* Vanessa by ensuring she was removed from Mr. Uribe's care or custody. See *People v Lalone,* 432 Mich at 114 ("we do not believe that a physician's reliance on the victim's statements in order to take protective action is of the sort envisioned by the drafters of MRE 803(4).")

Though Dr. Guertin did assess that Vanessa needed psychological treatment, he made no such referral. In hindsight, he testified that he should have referred her for psychological care, but his failure to do so underscores that this exam was not done in order to treat or diagnose Vanessa, but was done as part of the ongoing criminal investigation. (619a-620a)

Further, there appears to have been no follow-up care from Dr. Guertin. He apparently did not consult with Vanessa's primary care provider, Dr. Luginbill, who had seen Vanessa since birth and during the four-year gap described. He did not refer Vanessa for any follow-up care. Dr. Guertin examined Vanessa, sent a report to the police, and did nothing more.

It is also notable that protocol called for allowing Vanessa to have a support person accompany her during the exam. The support person is admonished that "they cannot influence anything the child says… and if they do, we – they have to leave." (596a-597a) In this case, Vanessa's mother was allowed to be in the room during the exam, but she was specifically directed not to influence Vanessa's statements in any way – an admonition unlikely to be necessary during a medical exam.

This exam was not done for medical purposes. It was done to support the criminal investigation. Under these circumstances, Vanessa's statements were not reasonably necessary to any medical treatment or diagnosis.

2. There was no medical diagnosis or treatment where Dr. Guertin conducted the exam four years after the alleged assault.

The passage of time between the alleged abuse and Dr. Guertin's exam further establishes Vanessa's statements were not necessary to any medical treatment or diagnosis. In *Shaw,* seven years had elapsed between the alleged assault and Dr. Guertin's exam, which the court concluded, "minimize[ed] the likelihood that the complainant required treatment." *Shaw,* 315 Mich App at 9.

Conversely, in *Garland*, the complainant "went to the hospital for medical care the morning of the assault." *Garland,* 286 Mich App at 9.

Here, Vanessa did not report her allegation until four years after the last alleged incident, "minimizing the likelihood [she] required treatment." *Shaw,* 315 Mich App at 9. Indeed, Dr. Guertin conceded that given the passing of time, "most injuries… would be long healed." (600a) A significant gap between the alleged assault and exam has been cited in other cases that held statements were not reasonably necessary for medical treatment or diagnosis. See *People v Mosko,* 190 Mich App 204; 475 NW2d 866 (testimony from physician repeating complainant's statements made during an exam three months after disclosure held inadmissible under MRE 803(4)); *DePlanche*, 183 Mich App at 686-690 (statements not admissible under MRE 803(4) as not made in connection with treatment where complainant was examined six months after alleged incident in order to substantiate the alleged abuse and determine if child needed therapy or protection).

3. Vanessa's statements to Dr. Guertin did not dictate the exam; therefore her statements were not reasonably necessary to any medical treatment or diagnosis.

Where Dr. Guertin performed the same examination he would have performed regardless of Vanessa's statements, the prosecution did not establish the reasonable necessity of her statements to any medical treatment or diagnosis.

Dr. Guertin knew from the intake form that Vanessa was a suspected victim of sexual assault. (595a) He described the standard exam he conducts on suspected victims of child sexual abuse. That exam includes an oral history, followed by

examination of a child's genitalia and anus. (607a-609a) The exam is documented by taking pictures. (608a-609a) Often, either based on oral history or observation, his team will take specimens from a complainant's vagina or anus for testing. (608a-609a) Urine is also sampled and blood is drawn for testing. (609a)

Dr. Guertin conducted this standard exam on Vanessa. He examined her vagina and anus, and documented the exam with pictures. (608a-609a) He took swabs from her rectum, based on her report, to test for sexually transmitted infection. (609a) He also took blood and urine specimens to test for infection. (609a-610a)

The steps taken by Dr. Guertin during his exam of Vanessa are the same steps he takes in any given exam for suspected sexual abuse. In fact, he examined Vanessa's vagina even though she clearly stated that Mr. Uribe never touched that part of her body. Dr. Guertin's exam was different than the exam in *Garland*, where the SANE nurse testified her exam was dependent on what the complainant told her. *Garland*, 286 Mich App at 9. The only specific step Dr. Guertin described that was somewhat dependent on Vanessa's statements was the swabbing of her rectum for sexually transmitted infections (which came back negative). (612a)

This standard testing for infection does not support the foundational requirement that Vanessa's statements were reasonably necessary for her medical treatment or diagnosis. To hold otherwise would allow for the admission of any statement to any medical provider at any time, no matter how remote the exam was from the alleged incident and no matter how unlikely the exam was to yield any

physical findings.

The Court of Appeals thus erred in holding that the requirements for admission under MRE 803(4) were met.

C. The erroneous admission of Dr. Guertin's hearsay testimony regarding Vanessa's statements undermines the reliability of the verdict and a new trial is warranted.

Reversal is required in this case because "it is more probable than not that a different outcome would have resulted without" the erroneous admission of Dr. Guertin's hearsay testimony. *Lukity*, 460 Mich at 495-496. To determine whether an error is prejudicial, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* at 495.

Dr. Guertin's hearsay testimony bolstered Vanessa's allegations with the imprimatur of a renowned expert. With no physical evidence or third-party witnesses to corroborate Vanessa's allegations, this trial turned on the jury's assessment of Vanessa's credibility. "In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful." *People v Gursky,* 486 Mich 596, 620–621; 786 NW2d 579 (2010).

In *Douglas*, this Court held a child forensic interviewer's testimony recounting the complainant's hearsay statements made during the course of a forensic interview was improperly admitted through MRE 803A (and would not

have been admissible under MRE 803(24)). *Douglas*, 496 Mich at 575. The forensic interviewer in *Douglas* had conducted "thousands" of interviews and was qualified as an expert in child forensic interviews. *Id.* at 569. She testified first as to the "general protocol used for child forensic interviews," then recounted in detail the complainant's statements describing the alleged sexual abuse. *Id.* The jury was also shown the video of this interview. *Id.* at 571.

When analyzing prejudice, this Court stressed the lack of other corroborating evidence and the one-on-one credibility contest the trial presented. This Court explained, the interviewer's testimony added "clarity, detail, and legitimacy" to the complainant's testimony, which in itself presented "ample room for reasonable doubt" based on inconsistency and reason to question whether the child had been improperly influenced by her mother. *Id.* at 581. This Court stressed the importance of the reinforcing testimony coming from a "neutral and authoritative source." *Id.* at 601.

Dr. Guertin likewise reinforced Vanessa's statements by repeating them through the lens of his impressive credentials, while also asserting his personal belief in her veracity. (See Issue II, *infra*) And as Judge Gadola noted in his dissenting opinion, the evidence against Mr. Uribe was not overwhelming. (1109a) He explained that as in *Shaw,* absent any eyewitnesses or corroborating medical evidence, the conviction turned on the jury's assessment of Vanessa's credibility. *Id.*

Though the prosecution did present propensity evidence through Mr. Uribe's estranged daughter, JU, that evidence lacked credibility and was minimally

probative. The timing of the alleged incident was unclear, though JU raised her allegation "quite a bit after Vanessa disclosed" hers. (849a) Counsel impeached JU with her prior inconsistent statements. (868a)

In response to a pretrial motion in limine, Judge Cunningham excluded JU's testimony, citing her "many concerns" about JU's allegations, including the inconsistency in her statement and the fact that in 2012 she told CPS investigators that her father never touched her in appropriately. (19a-22a). The Court of Appeals reversed on an interlocutory appeal. After hearing oral argument, this Court concluded JU's testimony was admissible, but vacated the Court of Appeals' judgment. *People v Uribe,* 499 Mich 921; 878 NW2d 474 (Mem) (2016).

Even considering any propensity inference allowed by JU's testimony, Vanessa's testimony left "ample room for reasonable doubt." *Douglas*, 496 Mich at 581. She described four incidents of anal sodomy perpetrated over a four-year period when she was between five and nine years old. Yet during this time, her mother saw no indication that anything was wrong. Vanessa did well in school during this timeframe. She saw Dr. Luginbill a year after the last alleged incident of abuse and he had no reason to suspect that she had been abused.

Like the expert in *Douglas,* Dr. Guertin impacted the verdict by repeating Vanessa's allegations to the jury with "clarity, detail, and legitimacy." *Douglas*, 496 Mich at 581. His testimony bolstered Vanessa's credibility to overcome the reasonable doubt otherwise apparent in this case. Under these circumstances, prejudice is established and a new trial is warranted.

II. The trial court abused its discretion in denying a mistrial after a prosecution expert testified that he believed the accusations against Mr. Uribe were true, thus encroaching on the jury's province as the exclusive finder of fact.

Issue Preservation and Standard of Review

The appellate Court reviews a trial court's denial of a mistrial for abuse of discretion. *People v Ortiz-Kehoe,* 237 Mich App 508; 603 NW2d 802 (1999). The challenge to Dr. Guertin's testimony was preserved by the defense motion for mistrial. (628a-631a, 686a-704a)

Discussion

Not only did Dr. Guertin recount the details of Vanessa's allegations, thereby unfairly bolstering her credibility, but he also testified, "in my opinion there would be no question that [Vanessa has] been sexually abused." (626a) This testimony was clearly inadmissible, violated the trial court's pre-trial order, and deprived Mr. Uribe of his right to a fair trial. In a case that turned on Vanessa's credibility, Dr. Guertin's inadmissible testimony made it certain that the jury would convict. A new trial is required.

A. Dr. Guertin's opinion testimony was clearly inadmissible.

As this Court explained in *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013), "[i]t is '[t]he Anglo–Saxon tradition of criminal justice ... [that] makes jurors the judges of the credibility of testimony offered by witnesses.' Because it is the province of the jury to determine whether 'a particular witness spoke the truth or fabricated a cock-and-bull story,' it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying

at trial." *Id.* at 348–349 (internal citations omitted). This Court has consistently applied this principle, holding that medical experts may not opine on the veracity of a complainant.

In *People v Smith*, 425 Mich 98, 109; 387 NW2d 814 (1986), this Court held that medical doctors could testify about their physical findings but their testimony should be limited to physical findings. In *Smith*, a doctor testified to his belief that the complainant had been sexually assaulted even though his examination revealed no physical evidence of assault. *Id*. at 102-103. This Court held that testimony should have been excluded because the "opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant." *Id*. at 112-113.

In *People v Beckley,* 434 Mich 691; 456 NW2d 391 (1990), this Court held that while experts may testify about the behavioral patterns of sexually abused children, "any testimony about the truthfulness of [the] victim's allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness. To hold otherwise would allow the expert to be seen… to possess some specialized knowledge for discerning the truth." *Id.* at 727-728.

In *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), this Court held "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." In that case, several expert witnesses had vouched for the

complainant's credibility by asserting their opinions that the complainant had been sexually abused. *Id.* at 354-356. This Court explained the particular danger in allowing such testimony in cases like this, which turn on the jury's assessment of credibility: "as we have cautioned before, the jury in these credibility contests is looking 'to hang its hat' on the testimony of witnesses it views as impartial." *Id.*

Most recently, in *People v Harbison*, the companion case to *People v Thorpe,* 504 Mich 230; 934 NW2d 693 (2019), this Court considered the testimony of a pediatrician, Dr. Simms, who informed the jury she had diagnosed the complainant with "probable pediatric sexual abuse," though the exam showed no physical evidence of assault. *Id.* at 235. This Court held "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id.* at 235. What's more, this Court noted the consistent application of the rule precluding such testimony: "[o]ther than the instant case, every Court of Appeals panel that has considered an examining physician's diagnosis of 'probable pediatric sexual abuse' has acknowledged that the admission of this testimony is error." *Id.* at 262.

Here, Dr. Guertin's testimony that he believed Vanessa had been abused was no different than Dr. Simms' diagnosis of probable pediatric sexual abuse in *Harbison*. Both opinions were based on the complainants' verbalized history, not on

physical findings. Both opinions conveyed to the jury that the testifying physician believed the complainant had told them the truth.

Dr. Guertin blatantly expressed his opinion that Vanessa was a victim of sexual abuse several times during cross-examination, redirect, and recross:

- "But if you're asking me do I consider to -- her to be a victim, I do." (623a)
- Answered, "yes," when asked by the prosecutor on re-direct whether he diagnosed Vanessa with sexual abuse. (624a)
- "I have held that opinion since then… And I'm now expressing it." (626a)
- "In my opinion, there would be no question that she's been sexually abused." (626a)
- "I think it should be clear that this document supports that she was sexually abused. And based on her history to me, I believe that she was." (627a)

Like Dr. Simms' testimony in *Harbison,* Dr. Guertin's opinion testimony violated this Court's bright-line rule that a physician may not express her opinion based solely on the patient's statements, absent any physical evidence of assault. *Smith*, 425 Mich at 109.

Contrary to the prosecution's assertion,[7] Dr. Guertin's exam did not yield any physical evidence that corroborated Vanessa's allegation. Dr. Guertin testified there was "no strictly abnormal finding" when examining Vanessa's anus. (611a) The "stretched area of skin," cited by the prosecution as corroborating evidence of abuse, had no scarring beneath it, and Dr. Guertin explained that stretched skin is seen

[7] See People's Answer to Application, dated 10/28/19, p 24, ("the case against Uribe contained physical evidence that supported the abuse. This physical evidence was the observation by Dr. Guertin that VG had stretches in her anus caused by either constipation or sexual abuse.

"fairly commonly normally." (611a) "Anything that stretches the skin," including the "pass[ing] of large stools or large volume stools or hard stools," can cause the stretched area observed by Dr. Guertin. (611a-612a) This finding is not diagnostic of abuse and did not corroborate Vanessa's allegations.

At trial, when the prosecution persisted in trying to label the stretched area of skin as abnormal or somehow diagnostic of abuse, Dr. Guertin reiterated, "[b]ut again, I have to tell you, we see it often enough where we either don't ask for an explanation or people aren't complaining about it, so. But there is no question, it can be from what she described, or it could've been. But because we see it often enough otherwise, we didn't count it as a big abnormal." (615a-616a)

Even Dr. Guertin conceded his opinion was based solely on Vanessa's verbal history. He explained at the pre-trial motion hearing that he believed Vanessa needed psychological treatment and "the reason for it was that she had given a very clear history of being sexually molested over a period of several years by a person who is a member of her household." (77a-78a) He further testified that, due to the passage of time since the alleged abuse occurred, "the likelihood of there being physical findings would be quite remote. But that doesn't preclude a diagnosis based on history… in the case of sexual abuse, it's common that the only element that you end up with in terms of establishing the diagnosis is the history." (78a) At the motion hearing, the prosecutor asked, "just because you did not find a tear to the anus, or you know, I guess an injury of the anus, does that necessarily mean that Vanessa was not anally raped?" Dr. Guertin replied, "no, not at all." (81a-82a)

He later confirmed, "[m]y opinion, **based on the history that she gave**, is that she was sexually abused." (94a) (emphasis added) When asked whether his opinion was based solely on her verbal history, he replied, "Yes. In, in most cases of sexual abuse that turns out to be the case." (95a)

Dr. Guertin's opinion that Vanessa had been sexually abused was based solely on her statements to him, and therefore, was clearly improper under *Smith* and its progeny, as well as the court's pre-trial order. (126a) Dr. Guertin's testimony "had the clear impact of improperly vouching for" Vanessa's credibility. *Thorpe*, 504 Mich at 264.

B. Trial counsel did not open the door to Dr. Guertin's improper opinion testimony.

Trial counsel did not open the door to Dr. Guertin's clearly inadmissible testimony that he believed Vanessa had been sexually abused. Counsel asked a straightforward factual question that did not invite inadmissible or unfairly misleading evidence. The Court of Appeals concluded defense counsel "did to some extent 'open the door' to [Dr. Guertin's] impermissible testimony by repeatedly questioning him about the lack of diagnosis in the report." (1106a) Judge Gadola disagreed and explained that Dr. Guertin's "unresponsive narrative answers… went beyond the scope of defense counsel's questioning," which did not elicit inadmissible evidence, but sought to "underscore that [Dr. Guertin] was not providing medical treatment" to Vanessa. (1109a)

A party opens the door to otherwise inadmissible evidence by itself presenting inadmissible evidence that tends to create a misimpression or to mislead the fact-finder. *Grist v Upjohn Co*, 16 Mich App 452, 483; 168 NW2d 389 (1969). The rule of "curative admissibility" permits the opposing party, subject to the judge's discretion, to point to otherwise inadmissible evidence as a way of placing the first party's potentially-misleading evidence in its proper context, thereby rebutting any false impression. 1 Wigmore, Evidence §15, pp 731-51 (Tillers Revision 1983); see *Grist*, 16 Mich App at 481, 483; *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988).

But a trial court may not allow inadmissible evidence "merely because the adverse party has brought out some evidence on the same subject, where the circumstances are such that no prejudice can result from a refusal to go into the matter further." *Grist,* 16 Mich App 482-483. This is because the doctrine is "intended to prevent prejudice and is not to be subverted into a rule for injection of prejudice." *United States v Winston*, 447 F2d 1236, 1240 (CA DC, 1971) quoting *California Ins. Co. v Allen*, 235 F2d 178, 180 (CA 5, 1956).

Foremost, Mr. Uribe did not present inadmissible or misleading evidence by asking Dr. Guertin about the lack of diagnosis included in his report, and the prosecution was not unfairly prejudiced by counsel's question. On cross-examination, trial counsel explored the lack of any formal diagnosis included in Dr. Guertin's report, as follows:

Q Now, Doctor, Dr. Guertin, I believe in prior times we've had hearings, and I believe you mentioned that sexual abuse can be a diagnosis.

A Sexual abuse, physical abuse, child abuse is a diagnosis, a medical diagnosis.

Q Which causes my next question, is that in your evaluation under your Assessment portion of your report, you never diagnose [Vanessa] as being a victim of sexual abuse.

A Well, I feel that the report, pretty much speaks for itself in that regard. **But if you're asking me do I consider to -- her to be a victim, I do**.

Q Well, you didn't put that in your report doctor.

A Well, it says:

"She gives a very clear history of being sexually molested between the ages of five and nine. She indicates that the person who did this was a man…"

Q Is it -- is it true, Doctor, you did not specifically say, and diagnose her specifically in your report that she's a victim of sexual abuse?

A Right. There's no portion in this assessment where it says diagnosis is sexual abuse, that's true.

(623a-624a) (emphasis added)

When counsel asked about the lack of diagnosis in his report, Dr. Guertin could have simply acknowledged the point as he did one question later, where he answered, "[r]ight. There's no portion in this assessment where it says diagnosis is sexual abuse, that's true." (624a) Or he could have explained that diagnoses are not always included in reports to law enforcement. He could have simply kept his answer as it began, "[w]ell, I feel that the report, pretty much speaks for itself in

that regard." (623a) Any of these options would have sufficiently answered counsel's question and cured any potential harm created by the question. Instead, Dr. Guertin presented inadmissible testimony to the jury in a manner that was not responsive to counsel's question. This statement – "if you're asking me do I consider her to be a victim, I do" – crossed the line and encroached on the jury's province. (623a)

On re-direct, the prosecutor accentuated Dr. Guertin's impermissible opinion testimony. The first question the prosecutor asked Dr. Guertin was, "[i]s that your diagnosis?" He replied, "Yes, it is." (624a)

After Dr. Guertin testified he believed Vanessa was a victim, and the prosecutor highlighted that opinion on redirect, defense counsel again challenged Dr. Guertin with the omitted diagnosis in his report to Detective Dahlke. The relevant portion of counsel's recross-examination is as follows:

> **Q** Dr. Guertin, you didn't say in your report, back when you did the actual assessment or evaluation, that she is diagnosed with — as a —— as a victim of sexual abuse. Now, five years later, reflecting back, you're saying that's my diagnosis?
>
> **A** Well ——
>
> **Q** Do you see where I'm having a problem with that, Doctor?
>
> **A** Actually, I don't. So, I think the report speaks for itself. You can read this report, and you can see what's said in it, you can see what I've pointed out in it. It's true, I do not have a section–
>
> **THE COURT:** Well –
>
> **THE WITNESS:** -- of the report that says diagnosis of child abuse.

[DEFENSE COUNSEL]: Well –

THE WITNESS: That doesn't mean I can't hold that particular opinion. In fact, I have held that opinion since then.

BY [DEFENSE COUNSEL]:

Q Well, Doctor –

A And I'm now expressing it.

Q Dr. Guertin, if this report was then provided to a psychologist or a social worker, they're reading it —— another professional, they're reading it, and they're like where's the diagnosis.

A Well, there's not a statement there that say "diagnosis: sexual abuse." If you read this report and read the content of this report and what we discussed, **in my opinion there would be no question that she's been sexually abused.** And I feel that way now, and I felt that way then.

Q There's no specific diagnosis victim of sexual abuse. But you never say anything in your report, victim of sexual abuse. Despite a diagnosis, you say nothing in your report that she's a victim of sexual abuse. Now, what's your –

A The entire report tends to say that she's a victim of sexual abuse. In fact, it says how it happened. It says the period of years in which it happened, gives the implication of almost how many times it happened. It describes whether or not she was manipulated into not saying anything about it, describes the circumstances of the disclosure. It describes the reasons why we had to test her for venereal disease. It describes whether or not she's protected. It describes whether or not the police are aware of this.

It is true there's not a line that says "diagnosis: sexual abuse." But if you are asking my opinion, and if you read this, I think it should be clear that this document supports that she was sexually abused. And based on her history to me, **I believe that she was**.

(625a-627a) (emphasis added)

Defense counsel's initial question about the report was a straightforward question of fact. Counsel did not ask Dr. Guertin whether he believed Vanessa was a victim or whether he had diagnosed her with anything. He simply pointed out no such diagnosis was included in the report.

Furthermore, this was after Dr. Guertin had already vouched for Vanessa, stating he should have referred her for psychological treatment because she had suffered a traumatic life event. (621a) Counsel did not elicit inadmissible evidence and he did not create a false impression that opened the door to Dr. Guertin's inadmissible expert opinion, based solely on Vanessa's verbal history. Thus, the rule of curative admissibility was inapplicable.

As the trial court agreed, defense counsel did not open the door to Dr. Guertin's inadmissible opinion. When the court addressed the issue outside the presence of the jury, immediately after Dr. Guertin had testified, the prosecutor suggested defense counsel opened the door to Dr. Guertin's improper testimony because "he wouldn't let it go." (629a) The court replied, "No, Dr. Guertin went off on his own."[8] (629a)

Even if counsel's question was objectionable and created a false impression the prosecution was entitled to cure, Dr. Guertin's blatantly inadmissible testimony was not responsive to the damage done. "Opening the door is one thing. But what

[8] The next day of trial, outside the presence of the jury, the court agreed with the prosecutor that "the defense, to some extent, was the one that opened the door… [but that Dr. Guertin] repeatedly went off the reservation at the end of his testimony." (695a-696a)

comes through the door is another." *Winston*, 447 F2d at 1240. "[T]he test of whether rebuttal evidence was properly admitted is… whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The introduction of otherwise inadmissible evidence under the "open door" theory is permitted "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." *Winston*, 447 F2d at 1240; see *Grist*, 16 Mich App at 483; see also *Savoy v State*, 64 Md App 241, 254; 494 A2d 957 (1985).[9]

Dr. Guertin's repeated testimony that he believed Vanessa was a victim and that he diagnosed her with sexual abuse was not responsive to any alleged damage done by counsel's question. The testimony exceeded the scope of any invitation by defense counsel's question. There was no prejudicial, false, or misleading impression created by counsel's question that required the admission of Dr. Guertin's irrelevant and inadmissible expert opinion that vouched for Vanessa's credibility and virtually guaranteed the jury would convict.

[9] See also *People v Yager*, 432 Mich 887; 437 NW2d 255 (1989), where this Court granted a new trial, concluding that "[t]he defendant's reference to having been threatened with prosecution as a habitual offender did not 'open the door' to extensive questioning about the defendant's prior record."

C. Dr. Guertin's impermissible testimony that he believed Vanessa was sexually abused, solely based on what she told him, undermines the reliability of the verdict. The trial court's curative instruction could not properly remedy this harm; therefore, the court abused its discretion in denying Mr. Uribe's motion for mistrial.

Dr. Guertin's inadmissible opinion that there was "no question" Vanessa had been sexually abused was even more prejudicial than his recitation of her allegations, addressed in Issue I, *supra.* (626a) Dr. Guertin's testimony did not simply provide the jury a "hook on which to hang its hat." *Thorpe*, 504 Mich at 263-264, quoting *Beckley,* 434 Mich at 722. Rather, he usurped the role of the jury and hung the hat for them.

As addressed in Issue I, *supra,* this case turned on the jury's assessment of Vanessa's credibility. "There was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements." *Thorpe*, 504 Mich at 260. The timing of Vanessa's allegations, four years after the last alleged incident, provided further reason for doubt.

By repeatedly expressing his opinion that Vanessa had been sexually abused, Dr. Guertin effectively acted as a human lie detector. Exclusion of this type of testimony is "necessary to guard against the potential for jurors to view the expert . . . as 'possess[ing] some specialized knowledge for discerning the truth.'" *Thorpe,* 504 Mich at 263, quoting *Beckley*, 434 Mich at 727.

Dr. Guertin's testimony here is precisely the kind of information that does not assist the trier of fact in understanding the evidence, but rather, as the *Peterson* Court recognized, creates the risk that jurors will subordinate their own

commonsense judgments to seemingly impartial experts. *Peterson*, 450 Mich at 376. Like Dr. Simms' erroneous testimony in *Harbison*, Dr. Guertin's testimony was "pernicious" as it "invaded the province of the jury to determine the only issue in the case." *Id.* at 264.

This harm could not be alleviated by the trial court's curative instruction. The purpose of a limiting instruction is to cushion prejudice. See e.g. *People v Crawford*, 458 Mich 376, 385 (1993), citing *Huddleston v United States*, 485 US 681 (1988). However, sometimes "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v United States*, 391 US 123, 135 (1968); see also *People v Humphreys*, 24 Mich App 411, 415; 180 NW2d 328 (1970) (noting that sometimes the prejudice created by an improper line of argument cannot be eliminated, no matter the substance of a cautionary instruction). Put more vividly, sometimes the damage done is irreparable; the "bell [can't be] unrung"; the "ink stain [can't be] eradicated"; and the "stench [can't be] ignored." *People v LaForte*, 75 Mich App 582, 584; 256 NW2d 44 (1977). See also *People v Terry* 489 Mich 907; 796 NW2d 469 (2011) ("the curative instruction was insufficient to prevent prejudice to the defendant from the inference of truthfulness that the prosecutor sought to suggest by the improper, uninvited question concerning the polygraph test administered to [the co-defendant].").

Dr. Guertin's repeated inadmissible testimony that he believed Vanessa could

not be cured. The jury heard Dr. Guertin's impressive credentials, including his accomplished career devoted to examining suspected victims of child abuse. Then, he testified that law enforcement referred Vanessa to him for an extensive exam, which he described in detail, including everything Vanessa told him. Then, the jury heard multiple times that Dr. Guertin believed Vanessa's allegations and he diagnosed her to be a victim of sexual abuse. Hearing this opinion, from this witness, the jury had no choice but to convict. Declaring a mistrial was the only remedy "within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Request for Relief

Mr. Uribe asks this Honorable Court to grant leave to appeal and reverse his convictions, or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Michael R. Waldo
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MICHAEL R. WALDO (P72342)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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